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No. 88-32

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

RICHARD N. MORASH,
Respondent.

On Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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This brief *amicus curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICUS CURIAE*

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") is a federation of 90 national and international unions with a total membership of approximately 13,000,000 working men and women. The affiliates of AFL-CIO and their members have an interest in the sound interpretation and application of ERISA and in the proper interplay between ERISA and state laws designed to protect the interests of working men and women.

ARGUMENT

Introduction and Summary of Argument

The State of Massachusetts requires, under pain of criminal punishment, that an employer who discharges an employee pay all unpaid wages to that employee on the day of the discharge. The Massachusetts statute states that "[t]he word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." Mass. Gen. L. ch. 149, § 148 (1986).

In this case, Massachusetts claims that an employer violated this State law requirement by failing to pay two discharged employees the full wages due to them for unused vacation days. For present purposes, the parties have stipulated that the employer has agreed orally and/or in writing to make monetary payments to employees in lieu of unused vacation time. The parties have further stipulated that payments for used or unused vacation time are made from the employer's general assets. Petition, Appendix A, p. 9.

The question for this Court is whether enforcement of the Massachusetts statute in this case is preempted by the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.* ("ERISA"). In our view, ERISA has no such preemptive effect.

In simple terms, as we show in this brief, there is no preemption here because ERISA does not in any respect regulate the type of vacation arrangements—more precisely, wage or salary arrangements—at issue in this case: the payment by an employer, out of the employer's general assets, of regular wages or salary to an employee for periods not worked because the employee is on vacation; and, the payment by an employer, out of general assets, of a wage or salary premium to an em-

ployee for periods worked by the employee in lieu of taking a vacation.

Indeed, the Secretary of Labor, acting pursuant to express statutory authorization, promulgated definitive interpretive regulations shortly after the passage of ERISA, making clear that such arrangements are not covered by ERISA. And, from that time forward, the Department of Labor has consistently followed that entirely correct interpretation of the law. The Secretary's interpretive regulations are entitled to controlling weight and are dispositive here.

As we further show, the practical effect of reversing the Secretary's longstanding administrative interpretations would be for the first time to subject the most common vacation arrangements to the wide-ranging requirements applicable to benefit plans covered by ERISA, requirements not intended to—and consequently not well suited to—govern such arrangements. The present administrative rule, which leaves regulation of such arrangements to state law, is consistent with ERISA and effective protection of employee interests.

By the same token, as we show in the final portion of this brief, the Secretary has quite properly recognized that Congress intended to regulate other types of vacation arrangements—most significantly, the provision of monetary "vacation benefits" by multi-employer trust funds—that have the characteristics that prompted the enactment of ERISA. In this latter area, as Congress determined, federal regulation is necessary in order adequately to protect employee interests.

1. ERISA is *not* intended to regulate all aspects of the compensation arrangements between employers and employees. Indeed, the core aspect of most such arrangements—the periodic payment of wages or salary for work performed—is *outside the scope of ERISA*. Rather,

ERISA is intended to cover pension benefit plans and welfare benefit plans established to provide particular employment benefits *in addition* to regular wages or salary.

Congress was concerned that, prior to enactment of ERISA, such plans were being operated without adequate "minimum standards," and that as a result many of these plans were underfunded and unable to pay employees promised and anticipated benefits. ERISA § 2(a), 29 U.S.C. § 1001(a). Congress enacted ERISA in order that "minimum standards be provided assuring the equitable character of such plans and their financial soundness." *Id.* With respect to employee welfare benefit plans, the means chosen by Congress to achieve that result are summarized at the outset of the Act:

> by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts. [ERISA § 2(b), 29 U.S.C. § 1001(b).] [1]

In § 3(1) of ERISA, Congress defined in general terms the types of welfare benefit plans that are subject to this regulatory scheme: plans, funds, or programs, maintained by an employer, a union, or both, to the extent the plans, funds or programs are

> for the purpose of providing for [their] participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 302(c) of the Labor Management Relations Act, 1947 (other than pensions on retirement or death, and insurance to provide such pensions). [29 U.S.C. § 1002(1).]

[1] The additional requirements for employee pension benefit plans are separately summarized in ERISA § 2(c), 29 U.S.C. § 1001(c).

Consistent with the objectives of ERISA, this definition does *not* reach normal wage or salary compensation arrangements. But the statute does not in terms answer the general question of where "wage and salary arrangements" end and "welfare benefit plans" begin, or the specific question of into which category vacation arrangements of the type here fit.[2] That question is, however, answered definitively by the interpretive regulations promulgated by the Secretary of Labor shortly after passage of ERISA.

2. In § 505 of ERISA, the Secretary is given broad authority to issue interpretive regulations:

> SEC. 505. Subject to title III and section 109, the Secretary may prescribe such regulations as he finds necessary or appropriate to carry out the provisions of this title. Among other things, such regulations may define accounting, technical, and trade terms used in such provisions . . . .

Immediately after the passage of ERISA, the Secretary initiated a series of rulemaking proceedings in exercise of this authority. In the preamble to the first set of proposed rules under ERISA, issued on December 4,

[2] As we discuss *infra* at 16-18, some types of vacation arrangements—for example, vacation benefits provided through multiemployer trust funds—are clearly welfare benefit plans within the meaning of ERISA. Indeed, § 3(1) of ERISA expressly refers to employee welfare benefit plans providing "vacation benefits" as within the scope of the Act. That statutory phrase does not answer the question here, however, which is: whether the particular arrangements at issue in this case—payment by an employer out of the employer's general assets of regular salary during vacation periods or of additional salary in lieu of vacation—are "employee welfare benefit plans" or are part of normal pay practices.

1974—two months after passage of the Act—the Secretary set forth his intention to issue subsequent proposed ERISA rules respecting the line to be drawn between wage and salary arrangements and employee welfare benefit plans:

> The Secretary also anticipates issuance of regulations that will make it clear that other programs, including certain employer practices (whether pursuant to a collective bargaining agreement or not) under which employees are paid as a part of their regular compensation directly by the employer and under which no separate fund is established will not subject the employer to any filing or disclosure duties under Title I of the Act. Examples of the employer practices that may receive this treatment are payment of overtime pay, *vacation pay*, shift premiums, Sunday premiums, holiday premiums, jury duty or military duty, make-up pay, and pay while absent on account of illness or excused absences. [40 Fed. Reg. 42,236 (December 4, 1974); emphasis added.]

On June 9, 1975, the Secretary issued a proposed rule that dealt generally with criteria for determining whether a practice or arrangement is an employee benefit plan, on the one hand, or a wage or salary arrangement, on the other hand. 40 Fed. Reg. 24,642 (1975). In this proposed rule, the Secretary specifically addressed the status of vacation arrangements of the type in this case. The proposed rule stated:

> [T]he term 'employee benefit plan' shall not include the following practices and arrangements:
>
> * * * *
>
> (m) *Paid sick and vacation leave.* The payment of normal compensation by an employer out of the employer's general assets to employees on account of specified periods of time during which the employees perform no duties while sick or on vacation. [Proposed rule 2510.03-3(m), 40 Fed. Reg. 24,652-3 (June 9, 1975).]

The Secretary explained:

> Paid sick leave and paid vacations (§ 2510.3-3(m)) are not treated as employee benefit plans because they are associated with regular wages or salary, rather than benefits triggered by contingencies such as hospitalization. Moreover, the abuses which created the impetus for the reforms in Title I were not in this area, and there is no indication that Congress intended to subject these practices to Title I coverage. [40 Fed. Reg. 24,642-43 (June 9, 1975).]

On August 15, 1975, the Secretary promulgated the final rule on this issue. In the final version, the Secretary used the heading "payroll practices" to "distinguish[] welfare plans from employer payroll practices which, although related to benefits described in sections 3(1)(A) of the Act and 302(c) of the LMRA, are more closely associated with normal wages and salary." 40 Fed. Reg. 34,526 (August 15, 1975). Two parts of the final rule are particularly relevant here.

First, the rule specifically deals with the practice of paying employees their normal wage or salary while on vacation:

> (b) *Payroll practices.* For purposes of Title I of the Act and this chapter, the terms "employee welfare benefit plan" and "welfare plan" shall not include—
>
> * * * *
>
> (3) Payment of compensation, out of the employer's general assets, on account of periods of time during which the employee, although physically and mentally able to perform his or her duties and not absent for medical reasons (such as pregnancy, a physical examination or psychiatric treatment) performs no duties; for example—
>
> (i) Payment of compensation while an employee is on vacation or absent on a holi-

day, including payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons. [40 Fed. Reg. 34,531 (August 15, 1975) (codified at 29 C.F.R. § 2510.3-1(b)(3)(i)).]

The Secretary explained:

> Paragraph (b)(2) and (b)(3) of § 2510.3-1 are designed to deal with payment of compensation out of general assets of the employer during periods of employee absences. Such payment could be construed as an employee benefit when an employee is absent for one of the reasons for which benefits described in sections 3(1) of the Act and 302(c) of the LMRDA are provided. Taken together, paragraphs (b)(2) and (b)(3) illustrate the point that payment of normal compensation out of general assets while the employee performs no duties does not usually constitute a welfare plan. For example, the fact that an employee is not present to perform his duties in order to undergo a physical examination, the cost of which is paid by a medical benefits plan maintained by the employer of the employee, which constitutes an employee welfare benefit plan under section 3(1) of the Act, does not mean that wages paid for the time during the employee's absence for the physical examination constitute an employee welfare benefit plan.
>
> In addition, these paragraphs embody the substance of proposed § 2510.3-3(g) jury duty and court testimony, (l) informal policy on absence, (m), paid sick and vacation leave, and (o) job skill training. In addition, paragraph (b)(3) provides in effect that payment of compensation while an employee is absent for reasons other than physical inability to perform duties or other medical reasons (such as pregnancy, a physical examination or psychiatric treatment) does not constitute a welfare plan. In response to comments, payment of compensation at rates greater or less than normal compensation is permitted. [40 Fed. Reg. 34,526 (August 15, 1975).]

Second, the Secretary addressed the practice of paying employees premium rates for work during certain periods. Thus, the final rule includes in the category of "payroll practices" outside the coverage of the Act:

> (b)(1) Payment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances, such as—
>
> (i) Overtime pay,
> (ii) Shift premiums,
> (iii) Holiday premiums,
> (iv) Weekend premiums.
>
> [40 Fed. Reg.34,531 (August 15, 1975) (codified at 29 C.F.R. § 2510.3-1(b)(1)).]

The Secretary explained the reasons for excluding this practice from the definition of "employee welfare benefit plan":

> Paragraph (b)(1) of § 2510.3-1 deals with payment of compensation for work performed. Such compensation does not indicate the existence of an employee benefit plan, even if paid at a higher rate than normal on account of unusual circumstances. The regulation lists overtime pay (proposed § 2510.3-3(a)) and shift and holiday premiums (proposed § 2510.3-3(b)) as well as weekend premiums, as examples of such higher rates. (Although overtime pay and shift and weekend premiums do not present even borderline cases of Title I coverage, they have nevertheless been included as examples because of inquiries received by the Department of Labor.) [40 Fed. Reg. 34,526 (August 15, 1975).]

3. The arrangements at issue in this case are clearly covered by the foregoing interpretations in the Secretary's

final rule. For purposes of analysis, those arrangements can be considered in two parts.

First, the employer here has agreed to pay his employees their normal compensation for periods each year during which they are on vacation and accordingly not performing any work. This part of the arrangement is part and parcel of what is inherent in all wage and salary arrangements: the agreement on the employer's part to pay a certain amount of compensation in exchange for a certain amount of work from the employee. Here, the employer has agreed to pay a particular annual salary to compensate employees for working a certain number of weeks, but less than all the weeks, in a year. In the same manner, the employer has agreed to pay the employees a weekly salary for working a certain number of days, but less than all the days, in a week. Such vacation arrangements fall squarely within 29 C.F.R. § 2510.3-1(b)(3), and the Secretary is on sound ground in considering such arrangements to be normal compensation arrangements and not welfare benefit plans.

Second, the employer in this case has agreed that when employees do not take their full vacation, but rather put in more weeks of work during the course of the year than they have contracted to perform, those employees will be entitled to additional salary to compensate them for the additional work. This part of the arrangement is in the nature of a salary premium: for working during a vacation period, an employee in effect receives double the normal rate of pay. As we have seen, the Secretary has expressly determined in his final rule that compensation premiums of this type are not employee welfare benefit plans under ERISA. Thus, the Secretary excluded from the coverage of ERISA the "[p]ayment by an employer of compensation on account of work performed by an employee, including compensation at a rate in excess of the normal rate of compensation on account of performance of duties under other than ordinary circumstances." 29

C.F.R. § 2510.3-1(b)(1). While the examples given in the regulation—including "holiday premiums" and "weekend premiums"—do not expressly include vacation premiums, the latter is covered by the principle stated in the rule and is analytically indistinguishable from the listed examples. If premium pay for working on a weekend or holiday is to be treated as part of the normal compensation arrangements and not as a welfare benefit plan, the same should be true of premium pay for working instead of taking a vacation. *See also*, 29 C.F.R. § 2510.3-1(b)(3)(i) (determining that "payment of premiums to induce employees to take vacations at a time favorable to the employer for business reasons" is outside the coverage of ERISA).

4. The line the Secretary has thus drawn between payroll practices that are closely related to normal wages, including vacation arrangements of the type here, and welfare benefit plans is wholly consistent with the protective purposes of ERISA. Indeed, the basic reason for protecting the kind of employee welfare benefits covered by ERISA simply does not apply in the context of premium pay for accrued but untaken vacation leave any more than in the context of wage payments excluded from ERISA coverage.

The class of employee benefits covered by ERISA that are provided directly by an employer, and not by a separate benefit fund, are benefits that may become payable only on the occurrence of a contingency *outside the control of the employee*. Thus, welfare benefits covered by the Act such as major medical coverage or severance pay, are due the employee only if certain contingencies come to pass: hospitalization for the former, unplanned severance for the latter. *See*, 40 Fed. Reg. 24,642 ("Distributions from welfare plans are related to specific contingencies such as severance before normal retirement . . .," "[E]mployee benefit plans [relate to] benefits triggered by contingenices such as hospitalization.") The em-

ployee has no control over whether or when the contingency will occur, and, while the benefit may build up over time, the employee has no means to protect himself against the possibility that his expectation of the benefit will be defeated by the employer when and if the contingency finally occurs. In that context, ERISA functions to protect the employee's expectation by requiring reporting, disclosure and fiduciary obligations with respect to the benefit.

Such concerns are out of place in the context of vacation pay or premium pay for accrued but untaken vacation leave. Like wages, such payments are fixed, due at known times, and do not depend on contingencies outside of the employee's control; the employee may elect either to take vacation leave or "cash out" the accrued vacation payments owed, and the employee can protect himself by so choosing. If the accrued vacation accumulates over time, it is only because the employee has chosen to allow such an accumulation. And, if there is any danger of defeated expectations of vacation pay, it is no different from the danger of defeated expectations of wages for services given—a danger which Congress chose *not* to regulate in ERISA, relying instead on state contract and wage payment laws, such as the one in this case, to protect this aspect of the employer-employee relationship. In simple terms, ERISA does not regulate any aspect of the payment of wages or salary, including the timing of such payment.

5. The interpretations embodied in the Secretary's final rule have remained in force unchanged from the passage of ERISA to the present time. And, the interpretations have been confirmed by a consistent series of Department of Labor opinion letters. *See infra* at 17-18. The Secertary's interpretive regulations are, moreover, as we have seen, soundly based in the language and intent of the Act and are entitled to controlling weight.

As this Court stated in *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 843-844 (1984):

> If . . . the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.
>
> "The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [Footnotes omitted.]

Deference to the agency interpretation is particularly warranted where, as here, the interpretation "involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Products v. United States*, 288 U.S. 294, 315 (1933); *see also, Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers*, 367 U.S. 396, 408 (1961); *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

6. If, contrary to the settled authority requiring deference this Court were to reverse the interpretations given in the Secretary's rules and regulations, and con-

sistently confirmed over the years by Department of Labor opinion letters, see *infra* at 17-18, the practical consequences would be profound and anomalous. Vacation arrangements of the type in this case are commonly in use by employers throughout the country in virtually every industry aside from those characterized by intermittent employment. From the passage of ERISA until now, employers have not, in connection with such vacation arrangements, been required to, and have not in fact, complied with the broad-ranging requirements of ERISA that would come into play if those arrangements were deemed employee welfare benefit plans for purposes of ERISA.

Were this Court to reverse the Secretary's interpretations, for garden-variety vacation arrangements of the type in this case employers would have to satisfy the following requirements of ERISA: the reporting and disclosure requirements of Title I, part 1, the fiduciary requirements of Title I, part 4, and the enforcement and claims procedures of Title I, part 5.[3]

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[3] Under these provisions, an employer with a practice of providing paid vacation leave or pay in lieu of taking vacation would be required to establish and maintain the practice pursuant to a written instrument, ERISA § 402(a)(1). The written instrument would have to provide for a named fiduciary to administer the practice, *id.*, and that fiduciary would be required to comply with the fiduciary duties set forth in ERISA §§ 404-406. Employers would be subject to suit *in federal court* whenever an employee claimed that he or she had been denied a vacation on the terms promised by the employer, ERISA § 502(a)(1)(B) and (e)(1). And, employers would be required to provide in writing specific reasons for the denial of vacation leave requested, with an opportunity for review by the named fiduciary, ERISA § 503(1). Finally, employers would be required to provide "participants" and the Department of Labor with a summary plan description naming the fiduciary, agent for service of process, source of funding and other information, ERISA §§ 101(a), 101(b), 102(a)(1) and 102(b).

Although the Act states that the Secretary may exempt a welfare benefit program from all or part of the reporting and disclosure requirements, Section 104(a)(3) of ERISA, 29 U.S.C. § 1024(a)(3), the only applicable existing exemption is for unfunded welfare plans of fewer than 100 participants. 29 C.F.R. § 2520.104-20(b)(2)(i).

Congress concluded that each of these requirements, enforceable as a matter of federal law, serves an important employee protective purpose in assuring the proper administration of welfare benefit plans. And Congress concluded that, on balance, these federal requirements are *not* warranted in the employer's administration of pay and salary practices funded by the employer's general assets, and that the better course is to leave the regulation of such practices to state law. An inspection of the outline of ERISA's requirements set out in the margin is sufficient, we believe, to show that the Secretary's judgment that ERISA's requirements are not well-suited to the governance of vacation arrangements of the type here and that, as is true with regard to other closely analogous pay practices, state law should govern, is both sound and sensible. Certainly whatever marginal employee gains there may be in altering the Secretary's present understandings and substituting federal regulation for state regulation at this point is dwarfed by the attendant costs and confusions.

7. It follows from the foregoing analysis that there is no preemption by ERISA here. Section 514(a) of ERISA provides for the preemption of state laws "insofar as they may now or hereafter relate to any employee benefit plan." If, as we have argued, the vacation arrangements in this case do not constitute an "employee benefit plan," then the threshold requirement for preemption is not met.

8. For the sake of completeness, we add that the fact, as we have shown, that the vacation arrangements here —regular and premium salary payments out of an employer's general assets—are not employee welfare benefit plans within the meaning of ERISA does *not* mean

that vacation arrangements of all varieties are outside the coverage of ERISA. Indeed, § 3(1) of ERISA *expressly includes* employee welfare benefit plans providing "vacation benefits" as within the scope of the Act. And there are in fact types of vacation arrangements, far different from those here, that have the characteristics of welfare benefit plans intended to be covered by the Act, and that are not simply part and parcel of an employer's normal wage or salary compensation arrangements. In a series of opinion letters, the Secretary has, therefore, delineated the types of vacation arrangements that are covered by ERISA.

The classic example of the vacation arrangements covered by ERISA is the provision of "vacation benefits" through a multi-employer trust fund. In industries where workers commonly work for numerous employers for short periods of time during the course of a year—for example, the construction, longshore, and maritime industries—it is not practicable to have vacation arrangements of the type at issue in this case. In these industries, individual employees typically do not have a continuing relationship with any one employer. The intermittent nature of the employment makes it infeasible for any one, short-term employer to grant a period of paid vacation leave.[4]

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[4] Congress addressed some of the peculiar problems caused by the nature of short-term employment in the construction industry in the Labor-Management Reporting and Disclosure Act of 1959 (the Landrum-Griffin Act), and the legislative history of that Act describes the short-term employment pattern in the construction industry and the resulting need for multi-employer vacation benefit funds. S. Rep. No. 1684, 85th Cong., 2d Sess., at 22-24 (1958). The Landrum-Griffin Act addressed that need by amending § 302(c) of the Labor Management Relations Act to authorize the use of trust funds, jointly trusteed by representatives of labor and of management, to provide vacation benefits as well as other types of benefits of similar importance to the construction industry, namely holiday benefits, severance benefits, and apprenticeship or other training programs. *See* 29 U.S.C. § 186(c)(6). Congress borrowed heavily from § 302(c) in deriving the list of benefits—including vacation benefits—that it included in the definition of "employee welfare benefit plan" under ERISA § 3(1)(A), 29 U.S.C. § 1002(1)(A).

In response to these realities, unions in such industries have commonly negotiated agreements whereby the employers in the industry contribute to a central trust fund which then provides a monetary "vacation benefit" to covered employees. Such vacation benefit plans do not involve any one employer's leave policy nor any simple continuation of regular salary by an employer. Rather, the contributions that participating employers make to the central fund are based upon each hour worked by covered employees or upon some other collectively bargained formula. See, for example, the plans described in ERISA Advisory Opinions 77-84A and 79-14A. Or, a certain amount of employee wages may be withheld and paid to the central fund. See, for example, ERISA Advisory Opinion 78-7A. Within the central fund separate individual accounts may be maintained for each employee or only one account may be maintained for all employees. See, e.g., Advisory Opinion 77-84A as an example of the former and Advisory Opinion 79-14A as an example of the latter. Eligible employees may receive vacation benefit payments at a certain time each year or upon application at the time of their choice. See, e.g., Advisory Opinion 80-20A as an example of the former and Advisory Opinion 78-7A as an example of the latter. Whatever the particulars, under such schemes vacation benefits are paid by the plan out of fund assets, not from general assets of any one employer.

Typically, the central fund is a trust fund administered jointly by union and employer representatives. See, for example, the funds described in *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F.2d 768, 769 (9th Cir. 1962); *Franchise Tax Board v. Construction Laborers Vacation Trust*, 679 F.2d 1307, 1308 (9th Cir.

1982) *vacated and remanded*, 463 U.S. 1, 103 S. Ct. 2841 (1983). For employees covered by such plans, *the trust fund, not any employer*, is the sole source of vacation benefits.

To meet the objectives of ERISA, such trust funds must be properly managed and fairly administered. The Department of Labor has consistently found such vacation benefit plans to be employee welfare benefit plans within the meaning of ERISA § 3(1), subject to the reporting, disclosure, fiduciary and enforcement requirements of parts 1, 4 and 5 of Title I of that Act, rather than "payroll practices" exempted by 29 C.F.R. § 2510.3-1(b)(3). See, ERISA Advisory Opinion Letters 76-21, 77-84A, 78-7A, 79-4A, 79-14A, 79-18A, 79-89A and 80-20A. In so finding, the Department has consistently distinguished these vacation benefit plans, which pay benefits from funds maintained separately from any one employer's general assets, from the kind of employer payroll practices at issue in this case.

The Department, we submit, has been entirely correct in this regard. All the statutory materials point to the conclusion that Congress intended ERISA to cover these multi-employer vacation benefit trust funds. By the same token, it is highly unlikely that Congress would have imposed such far-reaching regulatory requirements in connection with ordinary single employer vacation arrangements of the type here without any discussion of the matter or any demonstration of a need for regulation.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

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